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No. 89-2026 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.,

Petitioners,

v.

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Magnuson-Moss Warranty Act preempts states from supplementing the "minimum requirements" established pursuant to that statute for the operation of informal dispute resolution mechanisms.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Petitioners, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and the Association of the International Automobile Manufacturers ("AIAM"), ask this Court to review the opinion and judgment of the United States Court of Appeals for the Second Circuit rejecting their contention that certain provisions of the New York Lemon Law,[1] N.Y.

[1] "Lemon Law" is the generic name for state laws which create certain statutory rights and remedies for consumers who purchase seriously defective automobiles or "lemons."

Gen. Bus. Law §198-a (McKinney 1988), which regulate automobile manufacturers' dispute settlement programs, N.Y. Gen. Bus. Law §§198-a (g), (h) and (m), are preempted under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act ("Magnuson-Moss" or "The Act"), 15 U.S.C §§2301-2312, and the regulations promulgated thereunder, 16 C.F.R. Part 703. The Second Circuit unanimously held that the New York Lemon Law was not preempted. In rejecting petitioners' preemption arguments, the court ruled that: (i) Congress did not intend to occupy the field of informal dispute resolution mechanisms; (ii) there is no conflict between the New York and federal schemes because manufacturers can comply with both; and (iii) the Lemon Law amendments do not frustrate the purpose of Congress. Pet. A1 - A17.

For a thorough discussion of the underlying federal and state regulatory schemes and the proceedings in the district court, the Court is respectfully referred to the opinion of the Court of Appeals. Pet. A2 - A6.[2] Because the opinion below analyzing the interplay between the federal and state provisions is correct and because there is neither a conflict among the circuits nor any other basis for granting a writ of certiorari, respondent Robert Abrams, Attorney General of the State of New York, urges that the petition be denied.

REASONS FOR DENYING THE WRIT

There are several reasons why this case does not merit review by this Court.

First, the Second Circuit fully considered and correctly decided the issues in this matter. Relying upon the language, structure, and legislative history of the Act, opinions issued by the

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[2] References to the Petition and to the Appendix to the Petition are cited as "Pet. ____" and "Pet. A ____", respectively.

Fifth and Eighth Circuits and the position of the FTC, the court correctly concluded that Congress intended that in this area "federal law and state law should exist side by side" and that there was no preemptive conflict. Pet. A8. The decision of the Second Circuit is fully consistent with the preemption decisions of this Court and raises no new or important issues which have not been previously addressed by this Court.

Second, contrary to petitioners' assertion, there is no conflict among the courts of appeals. Both the Fifth and Eighth Circuits, the only two other circuits to consider the issue, have held that Magnuson-Moss does not preempt state laws. The Fourth Circuit decision relied upon by petitioners did not involve a state statute that supplements the federal requirements applicable to dispute settlement mechanisms.

Finally, the decision of the Second Circuit is fully consistent with the position of the FTC, the agency responsible for administering Magnuson-Moss, *i.e.*, that states may provide additional and more stringent consumer protections beyond those found in federal law. In addition, the FTC currently has before it and is considering comments received in connection with an administrative petition filed on April 11, 1988, by which petitioners ask the FTC to amend Rule 703 to expressly preempt state lemon laws regulating dispute settlement mechanisms. 54 Fed. Reg. 21070 (May 16, 1989). Because the FTC's resolution of the rulemaking proceeding will have a direct impact on the issues in this case, it would be premature for the Court to grant certiorari at this time.

1. The Second Circuit Correctly Decided That The New York Lemon Law Is Not Preempted

The Second Circuit's conclusion that the New York Lemon Law is not preempted is firmly rooted in well-established principles of federal law and decisions of this Court. It is also entirely

consistent with the plain language of Magnuson-Moss, Congress' intent in enacting the Act and the view of the FTC and the courts that neither the Act nor its regulations preempt state legislation establishing additional rights and remedies for consumers who purchase defective automobiles. Magnuson-Moss explicitly preserves the right of states to enact such legislation. Moreover, compliance with the New York Lemon Law neither conflicts with nor frustrates the purposes of the Act. Indeed, the protections provided by New York advance the purposes Congress sought to achieve in enacting the Act. Petitioners' arguments to the contrary fail because petitioners misconstrue both the general principles of preemption and the language and purpose of Magnuson-Moss.

Reduced to its essence, petitioners' argument is that once the federal government legislates or regulates in a particular area, any additional regulation by the states upsets the balance intended by the federal government. As the Second Circuit correctly recognized, this is simply not the law. Where the federal government legislates in an area which has historically been regulated by the states, such as consumer protection, the presumption is that the states' traditional police powers are not preempted "unless that was the clear and manifest purpose of Congress." *California v. ARC American Corp.*, 109 S. Ct. 1661, 1665 (1989); *accord Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988); *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 715 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Chrysler v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1205 (5th Cir. 1985). The burden of overcoming this presumption is on the party claiming preemption. *California v. ARC American Corp.*, 109 S.Ct. at 1665. Given the language of the Act, the legislative history and the position of FTC, this is a burden the Second Circuit correctly found that petitioners failed to meet.

The plain language of the Act makes abundantly clear that the remedies under the Act are not exclusive and that Congress

intended the Act to complement, not supersede, state law. As the Second Circuit stated, the broad savings clause, 15 U.S.C. §2311(b)(1),[3] followed by a provision explicitly preempting only legislation which relates to labeling and disclosures of warranties, 15 U.S.C. §2311(c)(1),[4] combined with a direction that the FTC "prescribe rules setting forth *minimum* requirements for any informal dispute settlement procedure," 15 U.S.C. §2310(a)(2) (emphasis added), "strongly suggests that Congress intended federal law in this area to supplement, not supplant, the rights and remedies provided by state law."[5] Pet. A8. If

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[3] 15 U.S.C. §2311(b)(1) states "Nothing in this Chapter shall invalidate any right or remedy of any consumer under state law or any other federal law."

[4] 15 U.S.C. §2311(b)(1) states:

> Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement
>
> (A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;
>
> (B) which is within the scope of an applicable requirement of sections 2302, 2303 and 2304 of this title (and rules implementing such sections), and
>
> (C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

[5] Reading the word "minimum" in the Act and Rule 703 at face value is also consistent with the traditional role of federal legislation as setting the floor, as opposed to the ceiling, of permissible regulation.

> Federal legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance courts should wait for a clear statement of congressional intent to work such an alteration.

(Footnote continued)

Congress had intended to preempt state regulation of dispute settlement mechanisms, Congress could easily have added another subdivision to the preemptive provisions of section 2311(c)(1). Not only did it not do so, but the FTC, when it promulgated Rule 703 in 1975, made no reference whatsoever to preemption, FTC, Promulgation of Rule, State of Basis and Purpose (hereinafter "Statement of Purpose"), 40 Fed. Reg. 50168 (Dec. 31, 1975), and included no preemptive language in the rule.[6]

In addition to downplaying the significance of the statutory language and the use of the word "minimum" in both the Act and the Rule, petitioners mischaracterize and trivialize the Act's purpose. Petitioners' argument that the Lemon Law is preempted rests on the mistaken assumptions that the purpose of the Act is to maximize manufacturers' flexibility and achieve nationwide uniformity in the operation of manufacturers' arbitration programs. Pet. A16. However, the legislative history reflects a concern with protecting consumers, not manufacturers. H. R. Rep. No. 1107, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702 (hereinafter "House Report").[7] Thus,

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Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1543 (D.C. Cir.) (emphasis in original; citations omitted), *cert. denied.*, 469 U.S. 1062 (1984). *See also California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987); *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. at 724; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-48 (1963); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 59 (2d Cir. 1988).

[6] Whenever the FTC has wanted to preempt state legislation, it has done so explicitly, further negating any inference that it intended to make its regulations exclusive here. *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 990 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Katherine Gibbs School Inc. v. FTC*, 612 F.2d 658 (2d Cir. 1979). *See also* 16 C.F.R. §§429.1 and 456.9.

[7] In enacting Magnuson-Moss, Congress sought to "assist the consumer in the enforcement of his warranty, . . . encourage suppliers of consumer products to produce more reliable products . . . [and to] alleviat[e] the inequities resulting from the imbalance which often exists in the relative bargaining power

(Footnote continued)

as the Second Circuit correctly observed, the "broad" and overriding goal of the Act is consumer protection. Pet. A16. There is simply no support in the Act or Rule for petitioners' contentions that the Act was intended to establish uniform or exclusive rules for the operation of dispute settlement mechanisms or to grant warrantors unfettered flexibility to operate dispute settlement mechanisms free from supplemental state regulation. Pet. A15. *See also Automobile Importers of America, Inc. v. Minnesota*, 681 F.Supp. 1374, 1380 (D. Minn. 1988), *aff'd*, 871 F.2d 717, 723-724 (8th Cir.), *cert. denied*, 110 S.Ct. 201 (1989).[8]

In fact, as the Second Circuit noted (Pet. A9), the FTC, the agency which promulgated Rule 703, agrees that the federal law supplements, and does not replace, state law. Thus, the FTC has stated that the Act "makes it absolutely clear that consumer rights and remedies under state law *would never* be affected by the Warranty Act." Warranties Complying with Magnuson-Moss Warranty Act, 41 Fed. Reg. 54004, 54005 (Oct. 4, 1977) (emphasis added). The FTC has also stated that "the protections of the Warranty Act are in addition to rather than in lieu of, warranty rights and remedies under State law" and that

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between consumers and suppliers of consumer products." House Report at 7747, 7748 (separate views of twelve Representatives). In particular, Congress was responding to the "Growing concern of the American consumer with the quality and durability of [consumer] products" and the "growing source of resentment [at] the inability to get many of those products properly repaired and the developing awareness that the paper with the filigree border bearing the bold caption 'Warranty' or 'Guarantee' was often of no greater worth than the paper it was printed on." House Report at 7706.

[8] The Senate Conference Report accompanying the Act noted that the Act's savings clause "preserves all alternative avenues of redress" and that for mechanisms to work "Commission rules [for dispute settlement mechanisms] must provide for participation in such procedures by independent or governmental entities." S. Conf. Rep. No. 1408, 93 Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7755, 7758-59. *See also* H.R. No. 1107, 93 Cong., 2d Sess. 45 (1974) ("The expansion of the FTC's jurisdiction . . . is not intended to occupy the field or in any way preempt state or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission.")

while allowing the use of uniform warranty documents is a goal of the Act, "this goal is subordinate to that of permitting the States to fashion their own scheme of warranty rights and remedies *which may be more protective than the minimum level of protection of the Federal Act.*" Preemptive Effect of Section 2311(c)(1) of the Magnuson-Moss Warranty Act, 43 Fed. Reg. 50737-38 (Oct. 31, 1978) (emphasis added). With respect to informal dispute settlement mechanisms in particular, the FTC has asserted, "by incorporating a mechanism into a written warranty, the warrantor undertakes obligations in addition to, not in lieu, of obligations under existing law." FTC, Statement of Purposes, 40 Fed. Reg. at 60191. In addition, the FTC further made clear that manufacturers are subject to diverse state regulation when it required that warrantors notify consumers in their warranty that state law may provide additional rights and protections. 16 C.F.R. §§701.3(a)(7)-(9).[9]

When the manufacturers' arguments are stripped of their erroneous premises and Magnuson-Moss is properly viewed for what it is — a scheme which contemplates dual federal-state regulation and which was enacted for the ultimate benefit of consumers, not manufacturers — it is clear that New York's Lemon Law neither conflicts with nor frustrates the purpose of the federal law.

The test of whether state law conflicts with federal law is not whether there are differences between the state and federal regulatory systems but whether compliance with the two is a "physical impossibility." *California v. ARC America Corp.* 109 S.Ct. at 1665; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 143. Applying this well-established standard, the Second Circuit correctly found that there was no preemptive conflict between the Lemon Law and Rule 703 because it is "possible to comply with both the New York and federal schemes." Pet.

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[9] 16 C.F.R. §701.3(a) (9) provides in particular that warranties contain the following disclosure:

> This warranty gives you specific legal rights, and you may have other rights which vary from State to State.

A17. Contrary to the assertions of the petitioners, compliance with the Lemon Law does not present manufacturers with a "Hobson's choice." Pet. 15. Without running afoul of Magnuson-Moss and Rule 703, the manufacturers can conform their arbitration programs to each of the specific requirements of the Lemon Law, including the requirements that (i) manufacturers comply with the decisions rendered by mechanism arbitrators; (ii) the mechanisms offer consumers the opportunity for an oral hearing; (iii) manufacturers maintain certain records in addition to those required by Rule 703; and (iv) arbitrators be trained in and apply the Lemon Law. Indeed, the record below demonstrates that manufacturers who offer programs which comply with one or more of these requirements can, and do, require consumers to utilize the manufacturer's arbitration program before suing in court under the Act. JA 146-151, 168-88, 196-97, 212.[10]

Thus, for example, as the Second Circuit noted, nothing in Rule 703 "forbids manufacturers from entering into binding arbitration." Pet. A13. In fact, virtually all manufacturers who offer dispute settlement mechanisms have agreed to be bound by the decision of their mechanisms and so advise consumers in their warranty. JA 146-48, 150-52, 159-63, 186-88, 197-205. *See also* 54 Fed. Reg. 21070. Compliance with the other provisions of the Lemon Law and federal law is also entirely possible. Oral hearings are expressly permitted by 16 C.F.R. §703.5(f) and are, in fact, provided under several existing dispute settlement mechanisms. Pet. A13-14; JA 120-21, 141-43, 146-51, 157-59, 166-88, 197-205, 306-7. The oral hearing requirement has been upheld by both the FTC and all of the courts which have considered the issue. *AIA v. Minnesota*, 681 F.Supp. at 1374; *Chrysler Corp. v. Armstrong*, No. 85-345, *slip. op.* (E.D. Ky. Apr. 30, 1985) (annexing and citing with approval FTC staff opinion) (annexed hereto as Resp. A).[11] Similarly, requiring

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[10] References to the Joint Appendix in the Second Circuit are cited as "JA __."

[11] References to Respondent's Appendix are cited as "Resp. A __."

arbitrators to be trained in the Lemon Law is perfectly consistent with Rule 703's requirements that decisions be "fair," that mechanisms be "competently staffed" and that arbitrators be interested in the fair and expeditious settlement of consumer disputes." 16 C.F.R. §§703.3(a), 703.4(c) and 703.5(d)(1). Nor is there any irreconcilable conflict between Rule 703 and the requirement that arbitrators apply Lemon Law remedies. The FTC regulation specifically includes the Lemon Law remedies of refund and replacement as "appropriate" remedies which can be awarded under Rule 703, 16 C.F.R. §703.5(d)(1). Moreover, petitioners cannot seriously contend that keeping the minimum additional records required by the Lemon Law makes it physically impossible to comply with federal and state law. Indeed, the right of states to require that records be kept in addition to those mandated by federal law has been specifically upheld by this Court. *Hillsborough County v. Automated Medical Labs*, 471 U.S. at 719.

Finally, as the Second Circuit recognized, each of the requirements objected to by petitioners promotes the broad consumer protection goal of the Act and is consistent with Congress' desire that consumer disputes be "fairly and expeditiously settled." 15 U.S.C. §2310(a)(1). Because the Lemon Law amendments are "designed in significant part to protect consumers -- i.e., to address 'growing consumer dissatisfaction with informal dispute settlement mechanisms' administered by motor vehicle manufacturers. . . .", Pet. A16-A-17 (quoting Memorandum of Governor Cuomo, Senate Bill No. 3342A, August 2, 1986), and to "give consumers more power in the dispute resolution process," Pet. A16-A17, they further, and do not frustrate, the purpose of the federal law.[12] Pet. A16.

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[12] None of the cases cited by petitioners are to the contrary. Because their assertion that New York's law is preeempted finds no direct support in either the Act, Rule 703 or in the case law arising under Magnuson-Moss, petitioners rely on cases which are unrelated to and involve statutes far different from Magnuson-Moss and which, for the various reasons discussed by the Second Circuit, are inapplicable to this case. Pet. A10. Thus, the cases relied on by petitioners either reflect a clear statement of federal intent to preempt state law, *see, e.g., Fidelity Federal Savings and Loan v. de la Cuesta*, 458 U.S. 141,

(Footnote continued)

2. There Is No Conflict Among The Courts of Appeals

Furthermore, contrary to petitioners' contention (Pet. 7-9), there is no conflict among the courts of appeals on the issue of whether Magnuson-Moss preempts a state lemon law. Indeed, there is overwhelming agreement among the courts that Magnuson-Moss permits state regulation which is more protective of consumers than the federal law.

The only other circuits which have considered the issue of whether Magnuson-Moss preempts a state lemon law — the Eighth Circuit in *Automobile Importers of America, Inc. v. Minnesota*, 871 F.2d at 717 and the Fifth Circuit in *Chrysler Corp. v. Texas Motor Vehicles Commission*, 755 F.2d at 1192 — have flatly rejected the contention that a state law supplementing federal remedies is preempted.

In *AIA v. Minnesota*, the Eighth Circuit rejected a virtually identical challenge brought by the petitioners here and upheld the Minnesota Lemon Law. Like the New York Lemon Law, the Minnesota law imposed requirements on manufacturers' arbitration programs that went beyond those found in federal law and which the FTC had rejected when it promulgated Rule 703. Thus, the Minnesota law, like the New York Lemon Law, required manufacturers to provide oral hearings. However,

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158 (1982) or involve matters of "peculiarly federal concern." *See e.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Pet. A10. The other cases mistakenly relied on by respondents involve state laws which deprived the intended beneficiaries of the federal legislation of, or impaired their ability to obtain, rights or remedies which went to the very heart of the legislation in question. *See, e.g., Adams Fruit Co. v. Barrett*, 110 S.Ct. 1384 (1990); *Felder v. Casey*, 487 U.S. 131 (1988); *Lawrence County v. Lead-Deadwood School District No.*, 469 U.S. 256 (1985). Because, as the Second Circuit observed, Magnuson-Moss was intended to protect consumers (Pet. A16-A17) and not to confer rights on the manufacturers Pet. A15), and because the New York Lemon Law enhances the rights and remedies of consumers and makes it easier for consumers to obtain meaningful redress of consumer disputes, the New York law furthers the purposes of Magnuson-Moss and is not preempted.

the Minnesota law went even further than the New York law by making warrantors' participation in dispute settlement mechanisms mandatory rather than optional. *Compare* N.Y. Gen. Bus. Law §198-a *with* Minn. Stat. Ann. §325F.665 (West Supp. 1990). In upholding the law, the court relied on the "language, structure and history of the Act [which] emphasize its supplemental, rather than preemptive nature." 871 F.2d at 720-721. It also held that by authorizing the FTC to adopt only minimum requirements and by incorporating a broad savings clause followed by language creating specific, narrow areas of preemption, Congress "intended to leave room for further state regulation." 871 F.2d at 721. The court rejected the manufacturers' arguments that warrantor flexibility was one of Congress' policies in adopting Magnuson-Moss, 871 F.2d at 723, and ruled that there was no preemptive conflict because, as in this case, compliance with both state and federal is possible and because the state Lemon Law was consistent with the federal goal of consumer protection.

Similarly, in *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d at 1192, the Fifth Circuit rejected the same arguments made here by petitioners and ruled that Magnuson-Moss does not occupy the field of informal dispute settlement mechanisms and that the Texas Lemon Law did not conflict with the federal scheme or frustrate Congress' intent. 755 F.2d at 1205-06. Indeed, the Fifth Circuit specifically held that "Magnuson-Moss preserves for consumers any rights or remedies created by state law" and that nothing in "the federal law either expressly or impliedly preempts [such state-created] remedies and procedures." 755 F.2d at 1203-05. Petitioners' reliance on a single sentence in the lengthy *Chrysler* decision to draw a distinction between state regulation of alternative arbitration programs and state regulation of manufacturer sponsored programs is clearly misguided. Both the Second and Eighth Circuits rejected such a distinction, relying heavily on the Fifth Circuit's analysis.

Petitioners also rely on *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987), to support their contention that there is a conflict in the circuits. However, in *Wolf*, the Fourth Circuit

simply upheld the dismissal of an individual common law fraud action alleging that, contrary to the manufacturer's representations, its dispute settlement mechanism was not independent and impartial as required by Magnuson-Moss. The court did not have before it a state statute that supplemented federal requirements applicable to dispute settlement mechanisms. In addition, presumably because the case did not involve a challenge to the state's dispute settlement mechanism statute, the Fourth Circuit reached its decision without the benefit of the views of the FTC or the State of Virginia, the two parties most affected by that court's judgment. The Fourth Circuit also reached its decision without reference to the statutory language of Magnuson-Moss, its legislative history or the otherwise uniform caselaw holding that Magnuson-Moss does not supplant state law.[13]

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[13] All other federal and state courts faced with the question of whether Magnuson-Moss or Rule 703 preempts state law have also held that they do not. For example, in *Chrysler Corp v. Armstrong*, No. 85-345, *slip. op.* (E.D. Ky. Apr. 30, 1985), the court upheld the Kentucky Lemon Law, relying in part on an FTC staff opinion stating that the oral hearing requirement imposed by Kentucky on manufacturers' informal dispute settlement mechanisms was not preempted and that Congress "expressly preserv[ed] a wide range of state laws that give consumers rights and remedies not provided by the federal law." Resp. All. *Accord*, *Walsh v. Ford Motor Company*, 807 F.2d 1000, 1012 (D.C. Cir. 1986) ("Congress sought only to supplement State warranty law by prescribing certain minimum standards for warranties and by affording consumers additional avenues for remedies"), *cert. denied*, 482 U.S. 915 (1987); *Katherine Gibbs School Inc. v. F.T.C.*, 612 F.2d at 667 (2d Cir. 1979) ("the Magnuson-Moss Act contains no preemption provision. Such indications of congressional intent as may be gleaned from the legislative history of the 1975 enactment and the predecessor bills considered by Congress show that the Commission's regulations were to have no more preemptive effect than that which flows inevitably from a repugnancy between the Commission's valid enactments and state regulations"); *Mackenzie v. Chrysler Corp.*, 607 F.2d 1162 (5th Cir. 1979); *State v. Fedders Corp.*, 524 F. Supp. 552, 556 (M.D. La. 1981) ("the Magnuson-Moss Warranty Act specifically provides that state law is not preempted . . ."); *Skelton v. General Motors*, 500 F. Supp. 1181, 1184 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981) ("Equally apparent from the Act and its legislative history is the Congressional reluctance to sanction a sweeping preemption of the law of commercial transactions traditionally the province of each of the fifty states . . ."), *cert. denied*, 456 U.S. 974 (1982);

(Footnote continued)

Thus, there is no actual conflict to be resolved by this Court. The addition of the Second Circuit decision to the roster of Fifth and Eighth Circuit opinions upholding state lemon laws reflects an increasing unanimity among the circuits since this Court denied certiorari in *AIA v. Minnesota*, 110 S. Ct. 201 (1989). Petitioners' argument that the Court should grant certiorari because "states are enacting and revising Lemon Laws with increasing frequency," Pet. 9, and are increasingly "attempt[ing] to regulate the field," Pet. 13, is irrelevant since the majority of state lemon law provisions cited by petitioners do not regulate manufacturers' dispute settlement mechanisms and is therefore not a basis for granting review in this case in the absence of any actual conflict among the courts of appeals.

3. The Court Should Not Review the Second Circuit Decision Because An Administrative Petition to Amend Rule 703 is Pending Before the FTC

On April 11, 1988, petitioners in this action filed a formal petition with the FTC, requesting that the Commission initiate a rulemaking proceeding under section 2309 of Magnuson-Moss to modify Rule 703 by, *inter alia*, expressly preempting state regulation of manufacturers' arbitration programs. The pendency of the FTC petition provides an additional reason why the Court should not review the Second Circuit decision.

The comments of the FTC to date regarding the rulemaking petition assume that the current rule does not preempt state legislation in this area. In seeking "public comment on whether Rule 703 should remain unchanged or whether it should be amended," 54 Fed. Reg. 21070 (May 16, 1989), the FTC acknowledged through the specific questions it posed that the current rule permits diversity and does not preempt state lemon

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Olmstead v. General Motors Corp., 500 A.2d 615 (Sup. Ct. Del. 1985); *Matter of State v. Ford Motor Co.*, 133 Misc. 2d 828 (N.Y. Sup. Ct. 1986), *modified on other grounds*, 136 A.D. 2d. 154 (3rd Dept. 1988), *aff'd*, 74 N.Y. 2d 495 (1989). *See also General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990) (holding that the same provisions of the New York Lemon Law challenged here were not preempted by a consent decree between GM and the FTC) (discussed at Pet. A14 - A15).

laws regulating dispute settlement mechanisms. Thus, the FTC asked "whether the cost of nonuniformity in the laws governing the resolution of warranty disputes outweigh the benefits of such non-uniformity" and whether the "achievement of uniformity," should become one of the purposes of any amended rule. 54 Fed. Reg. 21071-72.

Moreover, because petitioners base their administrative petition on virtually the identical legal arguments they raise in this case and because any final decision by the FTC will, in all likelihood, entail an analysis by the FTC of the preemptive scope of the rule as it now stands, and will have a direct impact on the issues in this case, it would be premature for the Court to grant a writ of certiorari at this time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 24, 1990

Respectfully submitted,

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Solicitor General

LAWRENCE S. KAHN
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JOHN W. CORWIN
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Counsel for Respondent

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

AT COVINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 83-45

CHRYSLER CORPORATION PLAINTIFF

VS.

DAVID L. ARMSTRONG, ETC. DEFENDANT

OPINION AND ORDER

This matter is before the court on cross-motions for summary judgment on the issue of whether either Congress or the Federal Trade Commission expressly or impliedly pre-empted the Kentucky Informal Dispute Resolution System statute, KRS 367.860, et seq.; by enactment of the Magnuson-Moss Warranty Act, 15 U.S.C. §2301, et seq., and promulgation of regulations thereunder, 16 C.F.R. §703, et seq. A careful review of the record reveals that no material issue of fact exists with respect to the pre-emption issue and disposition by summary judgment is appropriate.

The court has carefully considered the parties' briefs and the FTC staff opinion. It must be specifically noted that the latter is not a Commission determination. Therefore, it is not entitled to the deference afforded under 15 U.S.C. §2311(c)(2), and this court does not deem itself in any way bound by it. Nevertheless, the court is in complete agreement with the legal analysis contained within the FTC staff opinion. In summary, the Kentucky statutes are not disclosure or labeling requirements within the scope of 15 U.S.C. §§2302, 2303, and 2304, therefore, the express pre-emption provision of 15 U.S.C. §2311(c)(1) does not apply. Furthermore, the state oral hearing requirement is expressly preserved within 15 U.S.C. §2311(b)(1), as it creates a right or remedy to consumers under state law. Lastly, there are no

certain or inescapable conflicts between the Kentucky statutes and the Magnuson-Moss Act, its underlying purposes and objectives, or its implementing regulations, particularly 16 C.F.R. §703.5(f), which would require a finding of pre-emption by implication.

Chrysler has called the court's attention to *Wise v. General Motors Corp.*, 588 F.Supp. 1207 (W.D. Va. 1984), as supporting its position that 15 U.S.C. §2311(b)(1) was intended to protect only a consumer's right to sue for personal injuries under state law. The court concludes that the *Wise* decision is inapposite to the issues *sub judice*.

Chrysler is attempting to judicially engraft an amendment to §2311(b)(1) which Congress did not originally enact. This subsection simply does *not* read, "Nothing in this title shall invalidate or restrict any right or remedy of any consumer *for personal injury* under State law or any other Federal law." (Emphasis added) Neither does subsection (b)(1) by its terms pre-empt purely procedural rights while leaving state substantive rights intact. The court holds that the statute means what it says — "Nothing in this title shall invalidates or restrict any right or remedy of any consumer under State law. . . ," 15 U.S.C. §2311(b)(1), and should be read expansively in a manner consistent with the remainder of Magnuson-Moss. Since KRS 367.867 does not come within the purview of the federal statute's express pre-emption section, 23 U.S.C. §52311(c), the state oral hearing requirement is a preserved right or remedy under the federal law. Notwithstanding Chrysler's argument, the court holds that the source of these preserved state rights or remedies should not be restricted to those contained in Article 2 of the Uniform Commercial Code.

The *Wise* case does not support the proposition Chrysler seeks to advance. That case involved a personal injury plaintiff who sought to bootstrap a claim for emotional distress damages, stemming from an alleged breach of warranty by General Motors, onto the Magnuson-Moss Warranty Act. The court necessarily restricted itself to the topic of personal injury in construing other

court decisions, legislative history, and rights and remedies existing under applicable state warranty law. It had no occasion to address other consumer state rights and remedies akin to the facts of that case. The specific holding in *Wise* is that allegations of mere mental suffering and emotional distress without actual bodily injury are insufficient to state a claim for consequential damages under Magnuson-Moss, since the nature and measure of damages under state law (Virginia) are applicable to Magnuson-Moss, and Virginia law (U.C.C. §2-715(2)) did not recognize such claim.

The court having heard counsel and being sufficiently advised,

IT IS ORDERED as follows:

1. That plaintiff's motion for summary judgment be, and it is, hereby DENIED;

2. That defendants' motion for summary judgment be, and it is, hereby GRANTED for reasons stated within the FTC staff opinion;

3. An order tendered by the Attorney General has been executed concurrently herewith; and

4. The parties shall complete discovery on all remaining issues within ninety (90) days of the date of this order and file a joint status report at that time.

This 30th day of April, 1985.

/s/

JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

FRANKFORT AT COVINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 83-45

CHRYSLER CORPORATION PLAINTIFF

Vs.

DAVID L. ARMSTRONG DEFENDANT
In His Official Capacity
as Attorney General of the
Commonwealth of Kentucky

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

* * * * * * *

This matter is before the Court on Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment. Having considered the pleadings, motions, memoranda, and the affidavits submitted in connection therewith, the Court concludes that there is no genuine issue as to any material fact, and that the Defendant Kentucky Attorney General is entitled to judgment as a matter of law. IT IS ACCORDINGLY ORDERED AND ADJUDGED:

1. Plaintiff Chrysler Corporation's Motion for Summary Judgment is hereby denied; and

2. Defendant Kentucky Attorney General's Motion for Summary Judgment is hereby granted; and

3. The provisions of the Kentucky Automobile Dispute Resolution Act, KRS 367.860-367.870, are not pre-empted by the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq., or the regulations promulgated thereunder; and

4. The provisions of KRS 367.860-367.870 are applicable and enforceable as to Plaintiff Chrysler Corporation, so that even if the Dispute Resolution Program that Plaintiff Chrysler Corporation offers is in compliance with the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq., Plaintiff Chrysler Corporation is subject to the requirement that it provide a right to an oral hearing as a part of its dispute resolution program offered to Kentucky buyers.

Entered this 30th day of April, 1985.

/s/ William C. Bertelsman

United States District Judge

Kevin Noland, Assistant Attorney General
Consumer Protection Division
Office of the Attorney General,
Commonwealth of Kentucky
209 St. Clair Street
Frankfort, Kentucky 40601-1875

Dear Sir:

This is in response to your request for an advisory opinion under Section 111(c)(2) of the Magnuson-Moss Warranty Act (hereafter "Warranty Act"), 15 U.S.C. 2311(c)(2).[1] You asked for an opinion on whether one provision of Kentucky's Automobile Arbitration Act, KRS 367.860ff., is preempted by the federal Warranty Act. You suggest that either the Kentucky provision is not subject to preemption under the federal act, or, if subject to preemption, it should be preserved under Section 111(c)(2).

Kentucky's Automobile Arbitration Act provides that manufacturers selling automobiles with warranties in Kentucky must make available to consumers a dispute settlement mechanism (hereafter "mechanism") of one of two types. A company may provide a mechanism that complies with a series of requirements found in the Kentucky law. Alternatively, a company may provide a mechanism that complies with the Federal Trade Commission's Dispute Settlement Mechanism Rule,[2] but

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[1] You should understand that this opinion is that of Commission staff, and, as such, is neither attributable to nor binding on the Commission itself or any individual Commissioner.

[2] Rule on Informal Dispute Settlement Procedures, 16 C.F.R. Part 703, implementing Section 110(a) of the Warranty Act, 15 U.S.C. (a). Section 110(a) declares a Congressional policy to encourage warrantors voluntarily to establish fair, quick, informal consumer dispute settlement mechanisms. The section further provides that a warrantor who chooses to establish a mechanism meeting certain minimum requirements, to be set by Commission rule, may "incorporate" the mechanism in its written warranty; this is, the warrantor

(Footnote continued)

which meets one additional requirement: that the mechanism hold an oral hearing unless such a hearing is waived by the consumer. It is the requirement for an oral hearing that is at issue here.

Section 111(c)(2) of the Warranty Act creates a savings procedure, overseen by the Federal Trade Commission, for state requirements otherwise expressly preempted under Section 111(c)(1) of the Act. However, Section 111(c)(2) requires a notice-and-comment rulemaking proceeding as the basis for a decision to preserve such a state requirement. You have stated verbally to us that you are not, at this stage, requesting initiation of such a rulemaking proceeding. You also have stated that you would be satisfied with a staff opinion rather than a Commission advisory opinion. Accordingly, this response is a staff opinion limited to the question whether the Kentucky oral hearing requirement is preempted by the Warranty Act. We do not offer any opinion relating to the savings procedure of Section 111(c)(2).

As you know, the Chrysler Corporation, which has challenged the validity of the Kentucky law in court, has requested an opportunity to comment on the issue you have raised. Chrysler has in fact submitted comments and materials. We have carefully considered both your arguments and those of Chrysler in providing the following opinion.

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may require consumers to use the mechanism prior to pursuing rights under the Warranty Act in court. The Commission set those minimum requirements in the Dispute Settlement Mechanism Rule. The Commission chose not to include an oral hearing requirement as one of the minimum requirements for mechanisms eligible for "incorporation" into written warranties.

The federal Act and rule do not require any company to offer a mechanism. They also do not prohibit mechanisms that fail to meet the rule's minimum standards. They merely provide that warrantors may not "incorporate" noncomplying mechanisms into their warranties.

OPINION

It is our opinion that Kentucky's provision, requiring that dispute settlement mechanisms otherwise complying with the federal Dispute Settlement Mechanism Rule also provide for oral hearings, is not preempted by the Warranty Act, either expressly under Section 111 of that Act, or by implication under that Act or rules thereunder. Kentucky's reference to a federal standard in its Automobile Arbitration Act establishing arbitration as a state-mandated procedure does not affect the rights of consumers or warrantors within the federal scheme. Briefly, in our opinion:

> (1) The state requirement is not a disclosure or labeling requirement within the scope of Sections 102, 103 or 104 of the Warranty Act, 15 U.S.C. 2302, 2303, 2304, or of a rule implementing any of those sections. The state requirement is therefore not expressly preempted under Section 111(c)(1);
>
> (2) The state requirement is expressly preserved by Section 111(b)(1) of the Warranty Act, 15 U.S.C. 2311(b)(1), as creating a consumer right or remedy under state law;
>
> (3) There is no certain and inescapable conflict between the state requirement and the federal Act to require preemption by implication.

PREEMPTION UNDER SECTION 111(c)(1)

Kentucky's requirement of oral hearings clearly is not expressly preempted by the Warranty Act. Section 111(c)(1) of that Act states the very limited circumstance in which a state requirement will be preempted. That is where: (1) the state requirement concerns labeling or disclosure of written warranties or of performance under written warranties[3]; (2) the requirement

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[3] The Commission so interpreted the first condition for preemption, Section 111(c)(1)(A), in its Final Determination of the Applicability of Certain Provisions of California State Law, 42 Fed. Reg. 54004, 54005 (1977) (hereafter "California determination").

falls within the scope of a requirement of Sections 102, 103 or 104 of the Warranty Act or a rule thereunder, that is, of the federal labeling or disclosure provisions; and (3) the state requirement is not identical to the federal requirement. The Kentucky requirement for oral hearings in dispute settlement mechanisms is not a labeling or disclosure requirement. Also, it does not fall within the scope of Sections 102, 103, or 104 of the federal Act or rules thereunder. It falls solely within the scope of Section 110 and of the rule implementing that section. There is no express provision in the federal Act for preemption of such a requirement.

Chrysler has pointed out that the Commission's Disclosure Rule, implementing Section 102(a) of the Warranty Act, requires disclosure in the warranty document of information about any mechanism that consumers must use before pursuing their federal rights in court.[4] Chrysler argues that the Kentucky oral hearing requirement would affect the disclosure that must be made in the warranty, and would thus fall within the scope of the Disclosure Rule. The disclosure to be made in the warranty, however, is in no way affected by whether a mechanism provides for oral hearings. Neither the Kentucky law nor the federal Disclosure Rule requires the mechanism's procedures to be disclosed in the warranty document. Although the Dispute Settlement Mechanism Rule requires that the mechanism's procedures be disclosed to consumers, the disclosure need not be made in the warranty document. Thus the requirement to disclose the mechanism's procedures is not within the scope of the Disclosure Rule, and so does not result in express preemption of state law under Section 111 (c) (1).[5]

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[4] Rule on Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. Section 701.3(a)(6).

[5] The Dispute Settlement Mechanism Rule requires certain information about a mechanism, including its procedures, to be disclosed either in the warranty document or elsewhere. If a required disclosure may be made outside the warranty document, the disclosure is not within the scope of the federal Disclosure Rule. California determination, *supra* n. 2 at 54007.

STATE LAW SAVINGS CLAUSE: SECTION 111(b)(1)

In addition to the express delineation of the intended area of preemption in Section 111(c)(1), Congress created an express savings clause for state laws in Section 111(b)(1). That section preserves "any right or remedy of any consumer under State law . . ." The Kentucky procedure is a right or remedy of consumers under state law, and, as such, is expressly preserved under Section 111(b)(1) of the Warranty Act. Significantly, the Kentucky procedure does not purport to establish and does not directly affect any rights of consumers or warrantors under any federal law, including the Magnuson-Moss Warranty Act.

Chrysler has argued that Congress meant only to preserve state-created rights and remedies as to areas of warranty law where Congress and the Commission have not acted. There is no basis for this interpretation either in the language of the law or in its legislative history. The law itself makes it clear that the preservation of consumer rights and remedies under state law is paramount: it not only sets no limitation on the savings clause for state-created rights and remedies, but it expressly subordinates the preemption provision to the savings clause.[6] Also, the legislative history of the federal law shows that Congress anticipated additional state legislation even in areas where Congress had acted. For example, the Senate Committee report suggests that a state would be allowed to mandate a type of warranty (such as a "full" warranty) that the federal law describes, but does not require.[7]

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[6] The provision describing which state laws are to be preempted, Section 111(c) (1), begins: "Except as provided in Section 111(b) (1), ..."

[7] S. Rep. No. 93-151, 93d Cong., 1st Sess. 26 (1973). This discussion related to a version of the preemption provision that was more broadly preemptive than the version eventually adopted.

The statement in the legislative history on which Chrysler relies is miscited: the House committee report's recognition of the limited scope of the Warranty Act, cited by Chrysler as the reason for the inclusion of Section 111(b), actually refers to the need for Section 111(a) (preserving the Federal Trade Commission Act). H. Rep. No. 93-1107, 93d Cong., 2d Sess. 13 (1974).

IMPLIED PREEMPTION

State statutes can be impliedly preempted by federal action. The Supreme Court has found implied preemption in three types of cases: where there is an implied Congressional intent to occupy the field, where the state and federal laws conflict so directly that those affected cannot comply with both, or where the state requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[8] However, the Court is reluctant to infer preemption: the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists".[9] Kentucky's oral hearing requirement does not clearly conflict with federal law, and thus is not preempted by implication.

The Warranty Act and its history show no Congressional intent whatsoever to occupy the field of warranty law, or even to exercise exclusive jurisdiction as to those aspects of warranty law addressed in the Act. On the contrary, as discussed above, Congress incorporated an express provision that strictly defines the areas of state law which were to be preempted. This provision was revised and narrowed numerous times in successive drafts of the bill. Furthermore, as noted, Congress included a broad savings clause, expressly preserving a wide range of state laws that give consumers rights and remedies not provided by the federal law. In such a context, a finding of implied

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[8] Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *Accord*, Jones v. Rath Packing Co., 430 U.S. 519, 540-41 (1977); De Canas v. Bica, 424 U.S. 351 (1976); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[9] De Canas v. Bica, 424 U.S. 351 (1976); Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

[10] Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1959). *Accord*, Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1965); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

preemption of a state law outside the narrow realm of express preemption must be based on strong evidence of a necessary conflict with the federal Act or rule.

The Kentucky law mandating mechanisms with oral hearings in Kentucky creates no direct conflict with the federal law or rule. Kentucky's statutory procedure affects consumers' and warrantors' rights under state law, but does not affect their rights and remedies under federal law.[11]

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[11] As discussed earlier, the federal Disclosure Rule, *supra* n. 3, requires disclosure in a warranty of the availability of any mechanism that is incorporated into the warranty as a remedy to be exhausted before court enforcement of Warranty Act rights. Under the federal Dispute Settlement Mechanism Rule, a mechanism need not offer oral hearings to be eligible for incorporation into a warranty. Chrysler has argued that, since the Kentucky law requires the provision of oral hearings while federal law does not, a warrantor who complies with the Kentucky law must violate federal law, by disclosing in its warranty the existence of a mechanism that does not comply with the Mechanism Rule. This is incorrect for two reasons. First, the federal rule sets only minimum standards for procedure. A mechanism that meets its Kentucky obligations by adopting the federal procedures plus oral hearings would comply with the federal rule. Second, federal law does not prohibit noncomplying mechanisms. Thus, even if a warrantor adopts procedures under Kentucky law that actually conflict with the federal procedures, the warrantor can comply with federal law simply by refraining from incorporating the mechanism into the warranty.

Chrysler has also argued that the Kentucky oral hearing requirement would impose costs on consumers and thereby discourage consumer use of the mechanism, directly conflicting with the Commission's stated reason for rejecting mandatory oral hearings. However, the Kentucky law permits any consumer to waive his or her right to an oral hearing. Thus the state law should not discourage consumer use of mechanisms.

Finally, as Chrysler has argued, the Dispute Settlement Mechanism Rule's Statement of Basis and Purpose states that it would be "impossible" for many mechanisms to act quickly if they were required to include oral hearings. 40 Fed. Reg. 60190, 60209 (December 31, 1975). That issue, however, is not an issue with respect to preemption of Kentucky's law, because the state law requires both oral hearings and speedy action within the time frames of the federal rule. If a company cannot meet both requirements, the state law itself is violated. Thus the oral hearing requirement does not require a company to violate federal law in order to comply with state law or vice versa.

Finally, there is no such necessary conflict between the Kentucky law and the implementation of any federal goal as to require preemption of the state requirement. Section 110(a) of the Warranty Act expressly states the federal goal of encouraging warrantors to establish informal dispute resolution mechanisms. Although it is uncertain whether the ultimate result of Kentucky's law will be to increase or decrease the availability of mechanisms altogether, the possibility of conflict is insufficient to find preemption.[12]

CONCLUSION

Kentucky's statutory requirement that mandatory dispute settlement mechanisms offer oral hearings is not preempted by the Magnuson-Moss Warranty Act.

If you wish to discuss this staff opinion or related issues, please feel free to contact Rachel Miller at (202) 523-1670.

Sincerely,

/s/ William P. Golden
William P. Golden
Acting Associate Director for
Marketing Practices

/s/ Rachel Miller
Rachel Miller, Attorney
Division of Marketing Practices

cc: Chrysler Corporation

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[12] *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1965).